86-1326

No.....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES W. STEELEY and
JANET D. STEELEY, Petitioners

v.

HAROLD BURTON, et al, Respondents

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
CIVIL RIGHTS CLAIM

James W. Steeley Pro Se
Janet D. Steeley Pro Se
709 Merit Springs Road
Gadsden, Alabama 35901
(205) 546-0323

QUESTIONS PRESENTED FOR REVIEW

1. Was it reversible error for the Trial Court below, in granting summary judgement in favor of defendants to rely on Conway v. Village of Mt. Kisco, 750 F.2d 205 (2nd Cir. 1984) in its order of February 28, 1986, without citing Conway v. Village of Mt. Kisco, 758 F.2d 46 (2nd Cir. 1985)? (appendix p.45)

2. Was it reversible error for the Trial Court below, in granting summary judgement in favor of defendants, to rule that the City of Gadsden was immune from suit under Monell v. Department of Social Services, 436 U. S. 658, 98 S.Ct. 2018 (1978) ? (appendix p.49)

3. Did the Eleventh Circuit Court of Appeals below err in refusing to accord

some deference on review to the District Courts's interpretation of Monell, in light of their decision in Depew v. City of St. Marys, Georgia 85-8287, also Charles Earl Fowler v. City of St. Marys, Georgia, 85-8288? (Circuit Rule 25 affirmance without opinion. (appendix p. 53-54)

4. Was it reversible error for the Trial Court, after granting summary judgement in favor of defendants, to dismiss the remaining "excessive force" claims as Sanctions under Rules 11 and 37 of the Federal Rules of Civil Procedure, against the pro se plaintiffs? (appendix 50,51,52)

5. Did the District Court below in granting summary judgement in favor of Defendant, Terry Lane, a security agent

for South Central Bell, a private utility, misapply Adickes v. S. H. Kress and Co., 398 U.S. 144, 149, 90 S.Ct. 1598, 1604 (1970), in determining said defendant was not acting under " color of law" ? (appendix 6-7)

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OPINION BELOW

The Opinions of the United States District Court For The Northern District of Alabama are shown in the Appendix, pgs. 3-13 and 18-52. The summary affirmance, without opinion of the United States Court of Appeals For The Eleventh Circuit, is shown in the Appendix, pgs. 53-54. The denial of Appellants' Petition For Rehearing And Suggestion For Rehearing En Banc is shown in the Appendix, pgs. 55-56.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

STATUTES, FEDERAL RULES , AND REGULATIONS INVOLVED

1. 42 U. S. C. 1983.

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress. For the purposes of this section, any act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. FEDERAL RULES OF CIVIL PROCEDURE, RULE 11

Signing of Pleadings, Motions and Other papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.

The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it

is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

3. FEDERAL RULES OF CIVIL PROCEDURE, RULE 37 (d)

Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection

If a party or an officer, director, or managing agent of a party designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A),(B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall

require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26 (c).

PARTIES

James W. Steeley and Janet D. Steeley, plaintiff-appellants.

Harold Burton, Terry Lane, City of Gadsden, Alabama, Gerald Poe, J. Michael Garigus and Troy Higdon are the defendant-appellees.

QUESTIONS PRESENTED FOR REVIEW

1. Was it reversible error for the Trial Court below, in granting summary judgement in favor of defendants to rely on Conway v. Village of Mt. Kisco, 750 F.2d 205 (2nd Cir. 1984) in its order of February 28, 1986, without citing Conway v. Village of Mt. Kisco, 758 F.2d 46 (2nd Cir. 1985)? (appendix p.45)

2. Was it reversible error for the Trial Court below, in granting summary judgement in favor of defendants, to rule that the City of Gadsden was immune from suit under Monell v. Department of Social Services, 436 U. S. 658, 98 S.Ct. 2018 (1978) ? (appendix p.49)

3. Did the Eleventh Circuit Court of Appeals below err in refusing to accord

some deference on review to the District Courts's interpretation of Monell, in light of their decision in Depew v. City of St. Marys, Georgia 85-8287, also Charles Earl Fowler v. City of St. Marys, Georgia, 85-8288? (Circuit Rule 25 affirmance without opinion. (appendix p. 53-54)

4. Was it reversible error for the Trial Court, after granting summary judgement in favor of defendants, to dismiss the remaining "excessive force" claims as Sanctions under Rules 11 and 37 of the Federal Rules of Civil Procedure, against the pro se plaintiffs? (appendix 50,51,52)

5. Did the District Court below in granting summary judgement in favor of Defendant, Terry Lane, a security agent

for South Central Bell, a private utility, misapply Adickes v. S. H. Kress and Co., 398 U.S. 144, 149, 90 S.Ct. 1598, 1604 (1970), in determining said defendant was not acting under " color of law" ? (appendix 6-7)

STATEMENT

This suit under Civil Rights 42 U. S. C. 1983, 1985 and 1986, and other Constitutional considerations arises from various forms of harassment by the defendants, which culminated in an assault on petitioners' home, in which seven police officers in seven vehicles from 3 cities arrived at the home on Augst 10, 1985 to arrest petitioner James on a misdemeanor charge, which was instituted on June 21, 1984. Two of the policemen, absent a warrant, without announcing their presence,

forcibly entered the home via a second level deck and attacked petitioner Janet. Janet was handcuffed with her hand behind her back by a police officer who did not set the stops on the handcuffs causing them to restrict cirulation to her hands. She was charged with "resisting arrest." Janet and James were both cursed, threatened, handcuffed, assaulted and battered in front of their minor children. They were transported to the Gadsden Jail and locked in cells after Janet was "strip searched." Two days later, James and his minor son were surrounded by 6 Gadsden police cars and detained on the street for "investigation". Petitioners were tried in Gadsden Municipal Court, which is not a court of record on September 27, 1985. A special judge appointed to hear the cases, took them under submission.

When it became obvious to petitioners that a verdict was not forthcoming, they filed suit in the United States District Court For The Northern District of Alabama, on October 25, 1986. The Gadsden Municipal Court entered guilty verdicts on November 5, 1985. Petitioners appealed to the Etowah County Circuit Court for "trials de no." At the time of this writing, thoses cases have not been tried.

On November 22, 1985, Clerk of District Court enters default against Defendant Terry Lane.

On November 25, 1985, Defendant Terry files motion for summary judgement.

On November 26, 1985, Defendant Terry files motion to set aside default.

December 2, 1985, Order that motion to set aside default is granted, and Terry's motion for summary judgement will be taken under submission without oral arguments.

December 2, 1985, plaintiffs file response to Defendant Terry's motion to set aside entry of default.

December 27, 1985, the Court grants Terry's motion for summary judgement. (Order-appendix p.1-2) (Memorandum Opinion appendix p. 3-13)

December 30, 1985, plaintiffs file notice of appeal.

January 3, 1986, Court orders that all motions for summary judgement and all material in support or opposition to shall be filed before February 7,1986.

January 15, 1986, Plaintiff James files motion asking for Judge's recusal.

January 16, 1986, Court denies motion for recusal.

January 29, 1986 Plaintiff Janet files motion for change of judge.

January 30, 1986, Court denies motion for change of judge.

February 6, 1986, Gadsden Defendants file motion for sanctions.

February 7, 1986, Gadsden Defendants file motion for summary judgement.

February 7, 1986, Defendant Harold Burton files motion for summary judgement, no material in support accompanying said motion.

February 7, 1986, plaintiffs file motion requesting an extension of time in which to respond to summary judgement motions, since the Court had ordered that all material in support of or in opposition to shall be filed before February 7, 1986.

February 7, 1986, motion for extension denied.

February 14, 1986, plaintiff Janet moves to suppress her deposition, for the court reporters refusal to submit said deposition to her for signing without advance payment.

February 21, 1986, Order dated February 20, 1986, stating that Defendants, Town of Southside, Sue Price, Edwin Price, Johnnie Huie and Stanley Stroup have settled and compromised dismissing action against them with prejudice.

February 20, 1986, Shelia Ford,(wife of George Ford, Gadsden Defendants Attorney) submits affidavit. (no certificate of service)

February 20. 1986, Cheryl Phillips Court reporter submits affidavit with magazine article as exhibit. (no certificate of service)

February 24, Motion of Gadsden Defendants to dismiss or lesser sanctions.

February 28, 1986, Order that settlement between Defendant David Waters, (Rainbow City Police Officer) and plaintiffs is approved, costs taxed to defendant.

February 28, 1986, Order granting summary judgement in favor of remaining

defendants, except excessive force claims against Poe, Garigues, and Higdon, which will be dismissed as sanctions against the plaintiffs. (order-appendix p.14-17, Memorandum Opinion-appendix p. 18-52)

February 7, 1986, pre-trial conference oral arguments cancelled, no court reporter. Plaintiffs file pre-trial order to appoint Master, citing problems with Gadsden Defendants attorney, in regard to discovery.

March 5, 1986, plaintiffs file notice of appeal.

March 7, 1986, Defendants file petition for award of attorney's fees.

September 30, 1986, Eleventh Circuit Court of Appeals summarily affirms the

judgements of the Trial Court. (appendix p.53-54)

November 5, 1986, Eleventh Circuit Court of Appeals issues Order denying plaintiffs Petition for Rehearing and Suggestion for Rehearing En Banc. (appendix p.55-56)

EXISTENCE OF JURISDICTION BELOW

The United States District Court for the Northern District of Alabama had jurisdiction over these civil rights claims under 28 U. S. C. 1343(3)

ARGUMENT

The decisions below should be reviewed because because they erroneously interpret the civil rights statutes, and are in conflict with

with cases previously decided by this Court. If they are not in conflict, the issues of far reaching importance left undecided in those cases must be faced. In either event, this Court should grant review.

1. The Trial Court in its Memorandum Opinion, accompanying the Order granting summary judgement to respondents, (order appendix p.14-17, Memorandum Opinion-p. 45) the Court stated "In Alabama, a cause of action for malicious prosecution is an action 'not favored in law." The Court cites Conway v. Village of Mt. Kisco, 750 F.2d 205 (2nd Cir. 1984) in pertinent part the Court said: .."it is clear that while Ms Conways's civil rights claims based upon arrest or false imprisonment are barred by the statute, her civil rights claim based on

malicious prosecution are not." In its Order granting summary judgement to defendant Terry Lane, the United State District Court For The Northern District of Alabama, in the instant action (Order-appendix p.1-2) (Memorandum Opinion -appendix p. 11) states: " The gravaman of Mr. Steeley's complaint is malicious prosecution, which is an action not favored by law."

2. The Trial Court stated: " The City of Gadsden is not exposed to liability under the undisputed facts because there is no evidence whatsoever of a city policy or custom encouraging or permitting excessive force of the kind charged by the Steeleys. City of Gadsden is protected by Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978)." (Memorandum Opinion appendix-p.48-49)

Witnesses' testimony in depositions as well as other discovery, which was introduced by plaintiffs in material submitted opposing summary judgement, indicate that there are unwritten rules, policies, and customs which permit and encourage excessive force by police officers in the City of Gadsden, Alabama. This was alleged in plaintiffs' complaint.

The Eleventh Circuit Court of appeals in a similar case, Depew v. City of St. Marys, 85-8287, stated: "The evidence was far from overwhelming, but it was sufficient to support the jury's verdict. The jury was entitled to draw all reasonable inferences from the evidence and evaluate the credibility of the witnesses. The evidence revealed sufficient prior incidents where the police had used excessive force to put the city on notice. Yet the city

failed to take proper remedial action."

3. The Court of Appeals for the Eleventh Circuit, did not properly review petitioners' appeal. They affirmed the Trial Courts ruling under circuit rule 25 summarily without an opinion. In light of Depew v. City of St. Marys, cited in petitioners' brief, the Court of Appeals should have at least considered that aspect of the appeal.

4. On February 28, 1986, the Trial Court granted summary judgement in favor of the remainining defendantss and granted defendants' motion for the sanction of dismissal in favor of Poe, Garigues and Higdon, under Rules 11 and 37 of the Federal Rules of Civil Procedure.

Petitioners concluded their

discovery well ahead of respondents. Petitioner Janet's deposition lasted over eight hours and consisted of two volumes. The court reporter before whom the deposition was taken, refused to submit said deposition to Janet for signing unless she paid "cash up front" for a copy. The Trial Court did not rule on Janet's motion to strike the deposition. Petitioners moved for an appointment of a special master to oversee discovery and at the pre-trial conference when they again asked for Court supervision regarding discovery, they were told by the Court that they would have to learn the game of "hard ball."

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to

sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in pro se situations. Haines v. Kerner, 404 U. S. 519 (1972)

The Trial Court denied petitioners due process by not allowing them ample time to respond to respondents motion. "Rule 37 should not be construed to authorize dismissal of this complaint because of ... non compliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to wilfulness, bad faith, or any fault..." Societe Internationale v. Rogers, 357 U.S. 197, 212, (1958).

5. The Trial Court, in granting summary judgement in favor of Terry Lane, ruled that the defendant was not

acting under "color of law."(appendix p. 6-7) The trial court, to substantiate this cited Adickes v. S. H. Kress and Co., 398 U.S 144, 149, 90 S.Ct. 1598, 1604 (1970) In Adickes the Court states: "private party involved in conspiracy may , even though not himself official of the state, be liable under Statute providing civil action for deprivation of rights."

Terry Lane, a security agent for South Central Bell, a utility, routinely worked with state law enforcement officers instituting court ordered wire taps. " Nature of act performed, not clothing of actor or duty status, determines whether action is under 'color of law." 571 F.Supp. at 925 citing Stengel v Belcher, 522 F.2d 438 (6th Cir. 1975). 425 U. S. 910, 429 U. S. 119 (1976).

The Trial Court also erred in

granting summary judgement in favor of Terry Lane, by not allowing plaintiffs a reasonable opportunity to conduct discovery on the issues material to said motion. Poller v. Columbia Broadcasting Sys., Inc. 368 U. S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 282.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

James W. Steeley

James W. Steeley, Petitioner pro se

Janet D. Steeley

Janet D. Steeley, Petitioner pro se
709 Merit Springs Road
Gadsden, Alabama 35901
205-546-0323

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APPENDIX

James W. Steeley Pro Se
Janet D. Steeley Pro Se
709 Merit Springs Road
Gadsden, Alabama 35901
(205) 546-0323

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

JAMES W. STEELEY and)
JANET D. STEELEY,)
Plaintiffs)
VS.) CIVIL ACTION
HAROLD BURTON, et al.,) No. 85AR2796M
Defendants)

ORDER GRANTING PARTIAL SUMMARY JUDGEMENT

In conformity with the accompanying Memorandum Opinion, the court expressly determines that there exist no genuine issues of material fact as to plaintiffs' claims against defendant Terry Lane, and that said defendant is entitled to judgement as a matter of law. It is therefore

ORDERED, ADJUDGED and DECREED that

the motion for summary judgement filed by defendant Terry Lane is GRANTED and plaintiffs shall have and recover NOTHING of said defendant. Pursuant to Rule 54(b), F.R.Civ.P., the court determines that there is no just cause for delay in entry of final judgement in favor of defendant Terry Lane and against plaintiffs as to the relief heretofore granted and the entry of such judgement is hereby DEEMED ENTERED.

Done this 27th day of December, 1985.

William M. Acker, Jr.
United States District
Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

JAMES W. STEELEY and)
JANET D. STEELEY,)
Plaintiffs)
VS.) CIVIL ACTION
HAROLD BURTON, et al.,) No. 85AR2796M
Defendants)

MEMORANDUM OPINION

Plaintiffs, James W. Steeley and his wife, Janet D. Steeley, brought this action against defendants, Terry Lane and others, for alleged violation of 42 U. S. C. 1983, 1985 and 1986. Lane now moves for summary judgement.

THE RELEVANT UNDISPUTED FACTS

Lane was employed by South Central Bell as a security officer, Lane

obtained a warrant for the arrest of Mr. Steeley for allegedly issuing a worthless check dated December 27, 1983, to South Central Bell in the amount of $280.73. After Lane obtained the warrant, the prosecution of the matter was undertaken by the City of Gadsden as provided in Ala. Code (1975) 13A-9-13.1 and 13A-9-13.2 On November 5, 1985, Mr. Steeley was convicted in the Municipal Court of the City of Gadsden of issuing a worthless negotiable intrument. On October 25, 1985, prior to the conviction, both Mr. and Mrs. Steeley filed this action asserting that Lane and the other defendants had violated certain of their constitutional rights.

CONCLUSIONS OF LAW

Under no conceivable theory does

Mrs. Steeley have any cause of action against Lane. One spouse does not automatically have a claim because the other spouse is the victim of a constitutional tort. Mrs. Steeley states no fact which connects Lane with any problem personal to her.

The court will consider separately each of Mr. Steeley's claims against Lane. First, the court considers the 42 U. S. C. 1983 complaint

In pertinent part, 42 U. S. C. 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court has told us the elements of a 1983 action.

The terms of 1983 make plain elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right " under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show that the defendant acted under "color of

law."

Adickes v. S. H. Kress and Co., 398 U. S. 144, 149, 90 S.Ct. 1598, 1604 (1970). See, also, Monroe v. Pape, 365 U.S.167, 187-92, 81 S.Ct. 473, 484-85 (1961); Fullman v. Graddick, 739 F.2d 553, 563 (11th Cir.1984). Lane clearly was not acting under color of law when he obtained the warrant for the arrest of Mr. Steeley; rather, he was acting simply as an employee of South Central Bell in his capacity as a "private person". Therefore, Mr. Steeley has not established, and cannot establish a 1983 prima facie case.

Second, 42 U. S. C. 1985 states in pertinent part:

...in any case of conspiracy set forth in this section, if one or more

persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and excercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

A private citizen is subject to suit under 1985(3) only if he conspires to deny a citizen the equal protection of the laws. Griffin v. Breckenridge, 403 U. S. 88, 101, 91 S.Ct. 1790, 1798 (1971). However, the plaintiff must allege that there was"....some racial, or perhaps class-based, invidiously discriminatory animus behind the

conspirators' action." Id. at 102, 91 S.Ct. at 1798. Mr. Steeley does not allege any class based animus, much less tender proof of it. Thus, his 1985 claim against Lane must fail.

Third, the court reaches the claim asserted under 42 U. S. C. 1986. That section reads in pertinent part:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could

could have prevented.....

This statute by definition pertains to the wrongs set forth in 1985. Because Mr. Steeley has not alleged any violation of 1985 he also fails to state a claim under 1986.

Because Mr. Steeley is a pro se plaintiff, the court gives him the benefit of every doubt and looks to see if he may have some pendent claim against Lane which could tag along with any federal claim he may have against other named defendants. Mr. Steeley has not colorable asserted a pendent state claim for malicious prosecution against Lane. The reason may be that Mr. Steeley knows that he cannot state such a claim based on the undisputed facts. The undisputed facts of Mr. Steeley's actual conviction in the

Municipal Court may preclude all of his federal claims, but the other defendants have not yet filed Rule 56 motions.

The gravaman of Mr. Steeley's entire complaint is malicious prosecution, which is an action "not favored in law." Boothby Realty Co. v. Haygood, 269 Ala. 549, 114 So.2d 555, 559 (1959). The Supreme Court of Alabama has placed severe limitations on actions for malicious prosecution and, in justification of such a rule, says:

" One of the reasons for this rule is that public policy requires that all persons shall resort freely to the courts for redress of wrongs and to enforce their rights and that this may

be due without the peril of a suit for damages in the event of an unfavorable judgement by jury or judge.

Boothby Realty Co. v. Haygood, supra at 114 So.2d 559.

Mr. Steeley was actually convicted in the Municipal Court, a fact which clearly implicates Republic Steel Corp. v. Whitfield, 260 Ala. 333, 70 So.2d 424, 426 (1954), where the Alabama court holds:

".... the judgement of conviction, though later vacated and accused discharged, is prima facie evidence of the existence of probable cause for instituting the prosecution..."

While the record here is devoid of information as to whether or not Mr. Steeley has appealed from his Municipal

Court conviction, and if so, what the final result is, it would appear that his complaint constitutes no more than an attempt to obtain federal court protection from, or intervention into, a state judicial process which, for aught appearing, is functioning appropriately and is providing Mr. Steeley due process of law. Simply put, the judgement entered in the Municipal Court of the City of Gadsden on November 5, 1985, precludes any successful cause of action against Lane for malicious prosecution without any evidence whatsoever of a lack of probable cause.

For the reasons stated above, Lane's motion for summary judgement will be granted. An appropriate order will be entered.

Done this 27th day of December, 1985.

William M. Acker, Jr.

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

JAMES W. STEELEY and)
JANET D. STEELEY,)
Plaintiffs)
VS.) CIVIL ACTION
HAROLD BURTON, et al.,) No. 85AR2796M
Defendants)

ORDER

Pursuant to the accompanying Memorandum Opinion, the court ORDERS as follows:

1. The action as against defendants Pete Burns and Sue Glidewell is DISMISSED for want of prosecution.

2. The court expressly DETERMINES that there exists no genuine issue of material fact as to plaintiffs' action against defendants Harold Burton,

individually and as vice-president of Burton Food Stores, Inc., and City of Gadsden, and that said defendants are entitled to judgement as a matter of law. It is therefore ORDERED, ADJUDGED and DECREED that the motions for summary judgement filed by defendants Harold Burton, individually and as vice-president of Burton Foods, Inc. and City of Gadsden are GRANTED, and plaintiffs shall have and recover NOTHING of said defendants.

3. As to all aspects of plaintiffs' claims against defendants Gerald Poe, J. Michael Garigues, and Troy Higdon, EXCEPT plaintiffs' claim under #1983 that excessive force was employed during the arrests on August 10, 1985, the court expressly DETERMINES that there exists no genuine issue of material fact as to plaintiffs' said claims against

defendants, and said defendants are entitled to judgement as a matter of law as to all aspects of plaintiffs' claims against said defendants EXCEPT as to said claims. Therefore, it is ORDERED, ADJUDGED and DECREED that defendants' motions for summary judgement are GRANTED EXCEPT to plaintiffs' claims under #1983 for excessive force during the august 10, 1985, arrest, and the said motions are DENIED as to said limited aspect. The denial of said defendants' motions for summary judgement as to this narrow aspect of the action is rendered MOOT by the next numbered paragraph.

4. The motions to dismiss the action as appropriate sanctions under Rules 11 and 37, F.R.Civ.P. are GRANTED and the action, in its entirety, is DISMISSED with prejudice.

Costs are taxed against plaintiffs.

DONE this 28th day of February, 1986.

William M. Acker, Jr.

United States District Judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

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JANET D. STEELEY,)
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VS.) CIVIL ACTION
HAROLD BURTON, et al.,) No. 85AR2796M
Defendants)

MEMORANDUM OPINION

Pro se plaintiffs, James W. Steeley and Janet D. Steeley (Mrs. James W. Steeley), brought this action against numerous defendants for alleged violations of constitutional rights and of 42 U. S. C. 1983, 1985 and 1986. Terry Lane, one of the original defendants, earlier moved for summary judgement, and by order entered on December 27, 1985, the action was

dismissed as against Lane. Plaintiffs were granted leave to add as defendants Pete Burns, Mayor of the Town of Southside and Sue Glidewell, Mayor of Rainbow City, but plaintiffs never attempted to serve either Burns or Glidewell prior to the pre-trial conference, and the action as to Burns and Glidewell is due to be dismissed for want of prosecution. On February 21, 1986, plaintiffs voluntarily dismissed their action as against Town of Southside, Sue Price, Edwin Price, Johnnie Huie and Stanley Stroup. On February 28, 1986, plaintiffs voluntarily dismissed as against defendant David Waters. These defendants apparently concluded that a little "green balm" to plaintiffs was less expensive than a continued defense, including an inevitable appeal. The defendants remaining

are: Harold Burton, individually and as vice-president of Burton Food Stores, Inc.; City of Gadsden, Alabama; Gerald Poe, individually and as a police officer for City of Gadsden; J. Michael Garigues, individually and as a police officer for City of Gadsden; and Tony Higdon, individually and as a police officer for the City of Gadsden. Each of these defendants now moves for summary judgement under Rule 56, F.R.Civ.P. They also move for al dismissal, or, in the alternative, for lesser sanctions, their said motions being based on plaintiffs' continued evasions of discovery demands in violation of a previous court order, and on plaintiffs' failure to present a proposed pre-trial order at the pre-trial conference held on February 18, 1986.

THE FACTS BEARING ON

THE RULE 56 MOTIONS

The facts in this case, both disputed and undisputed, are somewhat involved. The court will attempt to outline the pertinent facts in as logical and economical a fashion as possible, giving plaintiffs the benefit of every doubt.

From the record it is difficult if not impossible to determine the facts which led up to the initial confrontation in July, 1984, but apparently Mr. Steeley wrote a worthless check to some unnamed payee (possibly Charles T. Day), as to which a warrant was issued for Mr. Steeley's arrest. The police tried unsuccessfully several times to serve him. At approximately 2:00 AM on a day in late July, 1984, former defendants

Stroup and Waters, both policemen, along with two Etowah County sheriff's deputies not herein named as defendants went to the Steeley residence, armed with the arrest warrant, for the purposes of arresting Mr. Steeley. Stroup and Waters met Mrs. Steeley there, entered the house over her protest and conducted a search for Mr. Steeley. They did not find Mr. Steeley. The policemen then left. On August 16, 1984, Mrs. Steeley met with former defendant Price at the Southside Town Hall, and paid Mr. Steeley's worthless check, plus the penalty cost. According to Mrs. Steeley, Price told her that the charges would be dropped. However, the Steeleys now assert that contrary to his promise Price entered a "conviction" in Southside's Court records. Price's affidavit executed on February 18, 1986, as to which there

is no sworn contradiction by the Steeleys, states:

"Mrs. Steeley came to my office at the City Hall and stated that she wanted to know if she could clear up a warrant that had been served to Mr. Steeley and that Mr. Steeley had sent her the necessary funds to take care of the matter and to resolve it. I explained to her that there would be a $25.00 fine and court costs and that she would have to pick up the check for Charles T. Day, which was in the sum of $195.00. I also advised her that the request she was making would be pleading Mr. Steeley guilty and paying a fine and court costs. As assistant chief I do not accept guilty pleas and I sent her to the magistrate for the payment of the fine and costs, which I understand, she did."

Perhaps the Steeleys did not controvert this affidavit because a settlement was brewing with the Southside Defendants. In any event if there were a material factual dispute between plaintiffs and the Southside defendants and defendant Waters, an officer of Rainbow City, it is now moot.

Mr. Steeley issued another allegedly worthless check on December 27, 1983, to South Central Bell. On June 21, 1984, former defendant Lane, an employee of South Central Bell, obtained a warrant for the arrest of Mr. Steeley for uttering the said bad check. Pursuant to this warrant, the prosecution of the matter was undertaken by defendant City of Gadsden as provided by 13A-9-13.1 and 13A-9-13.2 Ala. Code (1975).

Mrs. Steeley wrote an allegedly worthless check on February 1, 1985,

payable to Warehouse Foods, a/k/a Burton Food Stores. Defendant Burton, vice-president of Burton Foods, obtained a warrant for Mrs. Steeley's arrest on or about March 11, 1985. Former defendant Town of Southside undertook the prosecution of Mrs. Steeley on this check.

On August 10, 1985, both Steeleys were arrested, Mr. Steeley for issuing the worthless check to South Central Bell and Mrs. Steeley for issuing the worthless check to Warehouse Foods. There is considerable dispute as to what was said and done by whom and to whom during the arrest. The officers claim that Mrs. Steeley acted violently toward them and tried to prevent them from entering the house by slamming the door in their faces. This precipitated the arrest of Mrs. Steeley on a charge of resisting arrest as well as for

issuing the worthless check. The original arresting officers were defendants Higdon, Garigues and Poe, as well as other officers not herein named as defendants. Former defendant Huie, police chief of Southside, arrived during the arrest, and former defendant Waters arrived thereafter upon Chief Huies request. Mr. and Mrs. Steeley say that the officers were abusive and used excessive force. The officers say that Mrs. Steeley was openly hostile and required restraint, while Mr. Steeley remained relatively calm. The Steeley's were separated, handcuffed, and taken to jail in separate police cars. Mrs. Steeley was strip searched at Gadsden City Jail by a female officer. Such searches are routine in Gadsden in the instance of the incarceration of hostile prisoners, the purpose being to protect police

officers and jail personnel. Both Mr. and Mrs. Steeley were released on bail during the evening on the same day.

Mr. Steeley was thereafter convicted in the Municipal Court of Gadsden for issuing a worthless check. Mrs. Steeley was convicted in the Municipal Court of Southside for issuing a worthless check Both convictions are presently on appeal for trial de novo in the Circuit Court of Etowah County, Alabama, but have not been tried. The record does not reflect precisely the status of the prosecution, if any, of Mrs. Steeley on the charge of resisting arrest, but the affidavits of the Steeleys imply that she was convicted of that charge, too.

On August 12, 1985, two days after the arrests, Mr. Steeley was stopped in his car by Gadsden police officers allegedly because he fit the

description of a man wanted by the police. He gave the policemen his driver's license. The policemen checked his identification and his car's tag number through police headquarters. After Headquarters reported that there were no outstanding warrants on Mr. Steeley, the policemen allowed him to proceed. Mr. Steeley concludes that this was part of a conspiracy to harass him.

Based on these facts the Steeleys claim that their rights under the First, Fourth, Eighth, Ninth and Fourteenth Amendments of the Constitution of the United States were violated, as were their rights under 42 U. S. C. 1983, 1985 and 1986.

THE FACTS BEARING ON THE MOTIONS FOR DISMISSAL OR OTHER SANCTIONS

Plaintiffs failed to prepare or to

present a proposed pre-trial order at or prior to the pre-trial conference held on February 18, 1986, in the form clearly required by the order which set the pre-trial conference. A copy of the form of order to be employed was furnished to plaintiffs by the Clerk. Instead of using this form, plaintiffs forwarded to the court too late for it to be received by the court prior to his leaving Birmingham for Gadsden (they did not forward it to all counsel for the defendants) a paper called "Pre-trial Order Appointing Special Master". A copy of this paper, received by the court after the abortive pre-trial conference, is attached hereto as Exhibit "A". The Court had previously denied a motion by plaintiffs to refer the case to a magistrate.

The two purposes of the pre-trial

conferences were to hear arguments on pending motions and to arrive at a pre-trial order delineating the issues in anticipation of an upcoming trial date of March 17, 1986. The absence of a draft pre-trial order substantially frustrated the pre-trial conference. Although plaintiffs are pro se, Mr. Steeley acted and talked like a lawyer. He obviously has spent a great deal of time looking up law in this case and preparing pleadings and briefs. He and Mrs. Steeley are not due quite the deference which the courts give the average pro se plaintiff.

On January 14, 1986, the court denied plaintiffs' motion for a protective order and unequivocally required them to respond to defendants' discovery requests and to submit to deposition. Mrs. Steeley's deposition was taken on January 24, 1986, but

since that date she has refused to examine for possible corrections or to sign her deposition, whereupon the court asked for a copy of the unsigned deposition. The court has now read Mrs. Steeley's unsigned deposition as well as the affidavit submitted by the court reporter who took it, and finds that Mrs. Steeley refused to answer or evaded numerous relevant questions at the urging of Mr. Steeley, who attended and seemed to act as his wife's lawyer. Furthermore, on January 29, 1986, plaintiffs filed a purported response to requests for production objecting to all questions and invoking the Fifth Amendment. This refusal to respond to discovery was after the court had clearly pointed out to plaintiffs that a civil plaintiff cannot expect to proceed with his civil suit while withholding relevant discoverable facts on the basis of a claim against self-

incrimination.

At the pre-trial conference all parties agreed that Mr. Steley would promptly thereafter submit to deposition. Thus far, as far as the record reflects, he has not been deposed.

If plaintiffs have answered defendants' interrogatories propounded to them on December 10, 1985, the record does not reflect it. Plaintiffs persist in their stonewalling tactic.

CONCLUSIONS OF LAW

AS TO THE RULE 56 MOTIONS

The court will consider separately each of the Steeley's claims.

First, the court considers the claim brought under 42 U. S. C. 1985. This civil rights statute says in pertinent part:

"... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and excercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

A plaintiff in a 1985 case must allege and prove that there was ".. some racial or perhaps class-based , invidiously discriminating animus behind the conspirators' action." Griffin v. Breckenridge, 403 U. S. 808, 91 S.Ct. 1790 (1971). Plaintiffs here to not allege any class-based or

racial animus, much less tender any proof of it. Thus, their 1985 claim must fall.

Second, the court reaches the claim brought under 1986, which reads in pertinent part:

" Every person who, having knowledge that any of the wrongs conspired to be done and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented...."

This statue by definition pertains to the wrongs described in 1985. Because the Steeleys have not shown any

violation of 1985, the necessarily fail to state any claim under 1986.

Third, the court considers the various claims under 1983. Before looking into the statute itself, a relatively minor criticism of plaintiffs' various 1983 claims is that each plaintiff makes separate and distinct claims against different defendants. The hodgepodge of 1983 claims may make the complaint multifarious.

In pertinent part 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Steeleys fail to establish a prima facie case or a colorable basis for a 1983 claim. First, there is a serious question as to whether defendant Burton was acting under color of state law within the contemplation of 1983 when he signed the warrant and allegedly threatened Mr. Steeley with prosecution. Although the defendants who are municipalities or municipal employees were acting "under color of law", the Steeleys have not shown that the said defendants, or any of them deprived plaintiffs of any right secured by the Constitution or laws of the United States. In their complaint, the Steeleys claim that their rights

guaranteed by the First, Fifth, Eighth, Ninth and Fourteenth Amendments were violated. The court will look separately at each of these constitutional amendments invoked by plaintiffs.

The First Amendment states:

" Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedon of speech, or of the press; or the rights of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The facts viewed in the light most favorable to the Steeleys do not implicate any of the rights guaranteed by the First Amendment. Mr. Steeley's shotgun pleading approach is the approach which Rule 11, F.R.Civ.P., was designed to intercept. Mr. Steeley,

although he talks like a lawyer, is not able to justify his invocation of the First Amendment.

The Fourth Amendment States:

" The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

For aught appearing, all three warrants were issued by neutral and detached persons as required by Johnson v. United States, 333 U. S. 10, 68 S.C. 367 (1948). The fact that both plaintiffs were convicted for issuing worthless checks constitutes proof of probable cause for the issuance of the warrants themselves. There is nothing

to indicate that the warrants did not comply fully with Fourth Amendment requirements. As to the search for Mr. Steeley when he was not found, it was an incident to an attempted arrest pursuant to a lawful warrant, and thus was lawful. See Harris v. United States, 331 U. S. 145, 67 S.Ct.1098 (1947). The fact that the officers had a warrant for Mr. Steeley's arrest gave them authority to search his house in an attempt to serve the warrant. United States v. Cravero, 545 F.2d 406 (5th Cir.1976), cert. denied, 429 U. S. 100, 97 S.Ct. 1679 (1977). Perhaps the clearest description of a proper application of the Fourth Amendment to facts similar to these is found in United States v. Underwood, 717 F.2d 482(9th Cir.1983); cert denied, ___U.S. ____, 104 S.Ct. 1309(1984), where the Ninth Circuit held that an arrest

warrant is as good as a search warrant as to the premises where the party to be arrested may be reasonable expected to be found. In Underwood the premises were not those of the defendant. Here the house searched was actually the residence of Mr. Steeley. Where would be a better place to look for him? Finally, as the Supreme Court states in Chimel v. California 395 U.S. 752, 89 S.Ct.2034 (1968):

" When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered and the arrest itself frustrated."

395 U. S. 752, 762.

Therefore, both the searches and the frisks were reasonable under the

admitted facts here. They were not in violation of any Fourth Amendment rights.

The Fifth Amendment says:

" No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The court is at a loss to understand which rights provided by

the Fifth Amendment plaintiffs claim to have been violated by defendants. Perhaps the Steeleys anticipated that the court would require them to submit to deposition and to respond to discovery. They continue to refuse and to claim a privilege against self-incrimination. If the Steeleys were defendants in civil action, they could invoke the Fifth Amendment, but where they are plaintiffs seeking monetary damages of others, they must either waive their Fifth Amendment rights or suffer a dismissal of their complaint. The Fifth Amendment is a limitation on the federal government and not on any of these defendants. The only federal actor in this play is this court.

The Eighth Amendment States:

Excessive bail shall not be

required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The fines and bail imposed by the municipal courts of Gadsden and of Southside were not excessive, and no cruel or unusual post-conviction punishments were inflicted. No punishment whatsoever has been inflicted because of the pending of appeals for trial de novo. There are no Eighth Amendment violations.

The Ninth Amendment guarantees:

" The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The actions of the defendants in carrying out lawful arrests in no way violated the Ninth Amendmewnt or any of its penumbral rights. The invocation of the Ninth Amendment must be a product of Mr. Steeley's over-active imagination.

In pertinent part the Fourteenth Amendment states:

" No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

From the materials filed by plaintiffs it is clear that the claims unter the First, Fourth, Fifth, Eighth and Ninth Amendments are window dressing and that their real complaint under 1983 is based on an alleged violation of the Fourteenth Amendments "due process" clause. They do not attempt to articulate any violation of "equal protection". Their claims of denial of due process are excessive force and malicious prosecution.

The court will look at malicious prosecution first. A similar situation was presented in Conway v. Village of Mt. Kisco, 750 F.2d 205 (2nd Cir. 1984) where the Second Circuit said:

" Because there are no federal rules of decision for adjudicating 1983 actions that are based upon claims of malicious prosecution, we are required by 42 U. S. C. 1988 to turn to state law - in this case, New York state law- for such rules. In doing so, we find that New York law permits recovery on a claim of malicious prosecution only where plaintiff has established four elements":

(1) The defendant either commenced or continued a criminal proceeding against him; (2) that the proceeding terminated in his favor; (3) that there was no probable cause for the criminal proceeding; and (4) that the criminal proceeding was instituted in actual malice. (45.)

750 F.2d 214.

Assuming that a state law claim for malicious prosecution can be dressed up in 1983 clothes as a basis for federal jurisdiction, the law of Alabama on malicious prosecution is not dissimilar from New York. In Alabama a cause of action " not favored by law ". Boothby Realty Co. v. Haygood, 269 Ala. 549, 114 So.2d 555(1959). The Supreme Court of Alabama has placed even more severe limitations on actions for malicious prosecution than the New York Courts, and in justification of its rule has said:

" One of the reasons for this rule is that public policy requires that all persons shall resort freely to the courts for redress of wrongs and to enforce their rights and that this may be done without the peril for a suit for damages in the event of an

unfavorable judgement by jury or Judge. 114 So.2d 559.

Both Steeleys were convicted by courts having original jurisdiction, a fact which clearly implicates Republic Steel Corp. v. Whitfiel, 260 Ala. 333, 70 So. 2d 424, 426 (1954), where the Alabama court held:

"..... the judgement of conviction, though later vacated and the accused discharged, is prima facie evidence of the existence of probable cause for intituting the prosecution.

70 So.2d 426.

In this case the Steeleys did not await the outcome of their appeals to the Circuit Court of Etowah County. Instead they filed this action. Therefore, the judgements entered by the municipal courts preclude any action against any of the defendants for malicious prosecution, there being

no evidence whatsoever of a lack of probable cause, and all of the evidence being to the contrary. There is simply no evidence of a denial of due process as far as the prosecutions are concerned.

More troublesome is the conflicting evidence indicating the possibility that excessive force was employed on August 10, 1985, during the arrests. The court concludes that a viable 1983 claim survives Rule 56 analysis as to those remaining defendants who participated in the August 10 arrest. These defendants are Higdon, Poe and Garigues. City of Gadsden is not exposed to liability under the undisputed facts because there is no evidence whatsoever of a city policy or custom encouraging or permitting excessive force of the kind charged by the Steeleys. City of Gadsden is

protected by Monell v Department of Social Services, 436 U.S.658, 98 S.Ct. 2018 (1978).

Last but not least plaintiffs, vis-a-vis the police officer defendants, are faced with the very recent decision, Booker v. City of Atlanta, 776 F.2d 272 (11th Cir.1985), which grants immunity to police officers who act within the scope of their official duties in the good faith belief that their actions are legal and where the plaintiffs have an adequate state remedy. The instant set of facts cannot be made into a case of gross police brutality. If the Steeleys should successfully overturn their convictions they will have a state remedy for malicious prosecution. They already have a state remedy for assault and battery. It may be premature to decide whether the arresting officers were acting in the good faith belief that their actions were legal.

For the reasons above stated, the remaining defendants' motions for summary judgement are due to be partially granted.

CONCLUSIONS OF LAW AS

TO RULES 11 and 37

If Rules 11 and 37, F.R.Civ.P., are to serve the purposes for which they were promulgated this is a case for total dismissal of the Steeleys' action as the only appropriate sanction. No lesser sanction than dismissal is appropriate. The court has considered lesser sanctions, but because the plaintiffs have defied the court in almost every way possible, the court deems any less drastic sanction to be no more than "water off the duck's back". If the court felt that any lessor sanction would accomplish substantial justice such sanction would be imposed, but when plaintiffs were categorically ordered to answer

defendants' discovery requests crucial to their defense, and plaintiffs have refused to do so, the court cannot tolerate it. See Ford v. Fogarty Van Lines, Inc., 780 F.2d 1582 (11th Cir. 1986). Therefore, the action, insofar as it has not been disposed of under Rule 56, will be dismissed as a sanction under Rules 11 and 37. The Steeleys have filed and have prosecuted frivolous claims. They have played games with the court. The most recent example of game playing is found in "Plaintiffs' response to Defendants Motion for Sanctions" filed on February 25, 1986. This constitutes intransigence of a kind that can only be described as contumactious. While the court is able to understand the Steeleys' anger at being arrested in the presence of their children, the court refuses to be a vehicle for the

venting of plaintiffs' indiscriminate wrath on defendants. Paranoia and frustration are no substitutes for facts and law.

Done this 28th day of February, 1986.

William M. Acker, Jr.
United States District Judge.

DO NOT PUBLISH

IN THE UNITED STATES COURT

OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7004

Non-Argument Calendar

D. C. Docket 85-2796

JAMES W. STEELEY and

JANET D. STEELEY, Plaintiffs-Appellants

versus

HAROLD BURTON, etc., et al Defendants,

TERRY LANE, individually and as a

representative of South Central Bell,

Defendant-Appellee.

No. 86-7165

Non-Argument Calendar

D. C. Docket No. 85-2796

JAMES W. STEELEY and

JANET D. STEELEY Plaintiff-Appellants

versus

HAROLD BURTON, individually and as Vice President of Burton Food Stores, Inc., City of Gadsden, Alabama, a Municipal Corporation, Gerald Poe, individually and as a Police Officer for the City of Gadsden, Al., J. Michael Garigues, individually and as a Police Officer for the City of Gadsden, Al., E. Troy Higdon, individually and as a Police Officer for the City of Gadsden, Al.,

Defendants-Appellees.

Town of Southside, Alabama, a Municipal Corporation, et al., Defendants.

Appeals from the United States District Court for the Northern District of Alabama

(September 30, 1986)

Before GODBOLD, VANCE and JOHNSON, Circuit Judges.

PER CURIAM: AFFIRMED. See Circuit Rule 25. " Costs are taxed against plaintiffs-appellants." Judgement entered September 30 1986. For the Court Miguel J. Cortez Clerk. Issued as mandate:

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7004

JAMES W. STEELEY and JANET D. STEELEY,

Plaintiff-Appellants

versus

HAROLD BURTON, etc., et al.,Defendants

TERRY LANE, individually and as a representative of South Central Bell,

Defendant-Appellee.

No. 86-7165

JAMES W. STEELEY and JANET D. STEELEY,

Plaintiff-Appellants

versus

HAROLD BURTON, etc., et al.,

Defendant-Appellees.

Town of Southside, Al., etc., et al.,

Defendants.

Appeal from the United States

Court for the

Northern District of Alabama

ON PETITION FOR REHEARING AND

SUGGESTION FOR REHEARING EN BANC

Opinion September 30, 1986

Entered Nov. 5, 1986

Before GODBOLD, VANCE and JOHNSON,

Circuit Judges.

PER CURIAM:

The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be Polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26, the Suggestion for Rehearing En Banc is Denied.

ENTERED FOR THE COURT:

JOHN GODBOLD, United States Circuit Judge.